STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Deborah A Servitto, PJ; Michael J Talbot and William Schuette, JJ

CARL STONE and NANCY STONE,

Plaintiffs-Appellees,

v

DAVID A WILLIAMS, MD, JACKSON RADIOLOGY CONSULTANTS, PC, and W A FOOTE MEMORIAL HOSPITAL,

Defendants-Appellants.

/

Supreme Court Docket No. 133986

Court of Appeals Docket No. 265048

Jackson County Circuit Court
Case No. 03-001912-NH

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QUESTIONS PRESENTED

I. In a medical malpractice action, the second sentence of MCL 600.2912a(2) requires plaintiffs seeking to recover for loss of an opportunity to achieve a better result to prove that the lost opportunity was greater than 50%. Here Plaintiffs claim that had Mr. Stone's aneurysm been diagnosed earlier, the amputation of his legs would have been far less likely. Is this a "lost opportunity" case such that the requirements of the second sentence of MCL 600.2912a(2) apply?

The Plaintiffs/Appellees say: No.

The Defendants/Appellants say: Yes.

The Court of Appeals applied the second sentence of MCL 600.2912a(2).

Amicus Curiae Michigan Defense Trial Counsel says: Yes.

II. In *Fulton v William Beaumont Hospital*, 253 Mich App 70; 655 NW2d 569 (2002), the Court of Appeals interpreted MCL 600.2912a(2) to require that a plaintiff demonstrate that the opportunity lost was greater than 50%, to avoid absurd results where the lost opportunity was very small. MCL 600.2912a(2) was adopted to reject a Michigan decision permitting recovery for a lost opportunity of only 37.5%. Should *Fulton* be overturned to permit medical malpractice plaintiffs to recover where the opportunity lost is 5% or less?

The Plaintiffs/Appellees say: Yes.

The Defendants/Appellants say: No.

The Court of Appeals applied the test adopted in *Fulton*.

Amicus Curiae Michigan Defense Trial Counsel says: No.

III. This Court has affirmed the fundamental tenet of tort law that a plaintiff can only recover for injuries the plaintiff actually suffers. The lower courts aggregated the increased risks of all negative outcomes, including outcomes that Mr. Stone did not suffer, to determine whether Mr. Stone lost an opportunity that was greater than 50%. Should the loss of opportunity to achieve a better result be determined solely by reference to the increased risk of the injury actually suffered by the plaintiff?

The Plaintiffs/Appellees say:	No.
The Defendants/Appellants say:	Yes.
The Court of Appeals said:	No.
Amicus Curiae Michigan Defense Trial Counsel says:	Yes.

INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Defense Trial Counsel ("MDTC") is a business association organized and existing to advance the knowledge and improve the skills of defense lawyers, to support improvements in the adversary system of jurisprudence in the operation of the Michigan courts, and to address the interests of the legal community in Michigan. The MDTC appears before the Court as a representative of defense lawyers and their clients in Michigan, a significant portion of whom are potentially affected by the issues currently before this Court.

An important aspect of the MDTC's activities is representing the interests of its members in matters of importance before state and federal courts. Accordingly, the MDTC regularly submits *amicus curiae* briefs to the Michigan Court of Appeals and the Michigan Supreme Court advocating the interests of its members. On September 26, 2007, the Court invited the MDTC to submit an amicus curiae brief in this matter. The MDTC appreciates the opportunity to assist the Court in settling this important area of Michigan jurisprudence.

The important issue presented in this case is how and to what extent the Michigan Legislature limited the lost opportunity doctrine when it enacted MCL 600.2912a(2). The plain language of MCL 600.2912a(2) and the legislative history of its enactment leaves no doubt that the Legislature specifically rejected the theory that a medical malpractice plaintiff can recover under any malpractice theory when the possibility of survival or a better result is less than 50%. Likewise, the plain language of the statute demonstrates that the Legislature intended to prevent medical malpractice plaintiffs from recovering where the opportunity they lost was less than 50%. In doing so, the Legislature made a public policy decision to curb medical malpractice insurance costs, encourage physicians to practice in Michigan, and discourage the practice of defensive medicine. The Court of Appeals properly concluded that the limits imposed by the second sentence of MCL 600.2912a(2) on lost opportunity causes of action applied to this case

but misapplied the statutory limits. The Court of Appeals' decision undermines the balance struck by the Legislature between the interests of individual victims in recovering for medical malpractice and the interests in society in accessible and appropriate healthcare. The MDTC respectfully requests that this Court reverse the Court of Appeals' decision and restore the balance the Legislature intended.

BACKGROUND

The facts relevant to the legal issues presented in this *amicus curiae* brief are as follows:

1. In 1993, Michigan enacted MCL 600.2912a(2) as part of a bill that responded to the soaring cost of medical malpractice that was driving qualified physicians to retire or leave the State, contributing to an overall rise in healthcare costs, and promoting the practice of defensive medicine. HOUSE LEGISLATIVE ANALYSIS SECTION, 87TH LEG., ANALYSIS S.B. 270 (1993) (attached).

2. MCL 600.2912a(2), which has not been amended since its enactment in 1993, governs the burden of proof in all medical malpractice cases:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

3. The Michigan Legislature specifically intended MCL 600.2912a(2) to override the lost opportunity doctrine adopted in *Falcon v Memorial Hospital*, 436 Mich 443; 462 NW2d 44 (1990). SENATE FISCAL AGENCY BILL ANALYSIS, 87th Leg, SB 270 Enrolled Summary at 6 (Mich 1993) (attached). In *Falcon*, the Court held that the plaintiff could recover for the loss of the opportunity to survive even though the lost opportunity was less than 50% and it was not

probable than an unfavorable result could have been avoided.

4. Plaintiff Carl Stone sued the Defendants for medical malpractice after his abdominal aortic aneurysm ruptured in 2002. (Ct of Appeals Op at 2.) Mr. Stone's legs were amputated as a complication from the surgery to correct the rupture. (*Id.*)

5. More than two years before Mr. Stone's aneurysm ruptured, Defendants performed an arteriogram to evaluate Mr. Stone's blood flow. (*Id.*) Mr. Stone claims that Defendants should have identified his aneurysm at that time. (*Id.* at 3.) Mr. Stone claims that had Defendants diagnosed his aneurysm in 2000, he could have had elective surgery to correct the aneurysm with a much lower likelihood of amputation. (*Id.* at 3, 5.)

6. The evidence at trial in this matter is that the risk of amputation associated with elective surgery is approximately 1%. (*See id.* at 5.)

7. The evidence Plaintiffs submitted at trial shows that the risk of amputation associated with emergency surgery to repair a ruptured aneurysm is 40% to 50% for those who survive, or approximately 4% of all individual who undergo emergency repair of a ruptured aortic aneurysm. (*See id.*)

8. The Plaintiffs were also permitted to introduce evidence that the risk of death associated with the elective surgery was less than 5% while the risk of death from the rupture of an aortic aneurysm was approximately 90%. (*Id.*) Mr. Stone did not die. (*Id.* at 3-4.)

9. Even though any malpractice increased Mr. Stone's risk of amputation by no more than 50%, the trial court denied Defendants' dispositive motions including their motion for JNOV. (*Id.* at 3-4.) Instead, the trial court permitted the jury to compare all the risk factors faced between elective and emergency surgery, including the risk of injuries that Mr. Stone did not suffer. (*Id.* at 5.) After the Defendants appealed by right, the Court of Appeals affirmed the

trial court's decision and concluded that "[t]he analysis used by the trial court met the requirements of the statutory language because it was restricted solely to plaintiff's 'opportunity to achieve a better result.'" (*Id.* at 6.)

10. Defendants timely applied to this Court for leave to appeal, and this Court granted leave on September 26, 2007. In the Order granting leave, the Court instructed the parties to address four questions and invited the MDTC, among others, to participate as *amicus curiae*.

STANDARD OF REVIEW

The Court reviews questions of law *de novo*. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005); *Wold Architects & Engineers v Strat*, 474 Mich 223, 229; 713 NW2d 750 (2006). The Court also reviews issues of statutory interpretation, which are questions of law, *de novo*. *Bd of Cty Rd Comm'rs for the Cty of Oakland v Michigan Prop & Cas Guar Assoc*, 456 Mich 590, 610; 575 NW2d 751 (1998); *Graves v Am Acceptance Mort Corp*, 467 Mich 308; 652 NW2d 221, 222-223 (2002); *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

ARGUMENT

I. The Second Sentence Of MCL 600.2912a(2) Applies Because Plaintiffs Seek To Recover For The Loss Of An Opportunity For A Better Result And Not For A Direct Injury.

The Court of Appeals and the trial court both properly concluded that the second sentence of MCL 600.2912a(2) applied to Mr. Stone's malpractice claim because he is seeking damages for the loss of an opportunity to achieve a better result because of a delay in diagnosis, not a direct injury caused by Defendants. In the fourteen years since the Legislature enacted MCL 600.2912a(2), the Michigan courts have consistently applied the statute's second sentence to delay-in-diagnosis claims like that of Mr. Stone.

A. By its terms, the second sentence of MCL 600.2912a(2) applies to this case.

Under Michigan law, statutory construction starts by examining the statute's plain language. *People v Herron*, 464 Mich 593, 611; 628 NW2d 528 (2001). Where the language is unambiguous, courts presume the Legislature intended the meaning clearly expressed. *Id.* Further judicial construction is not permitted, and the statute must be enforced as written. *Id.*

Here, the plain language of the statute distinguishes between causation of an "injury" and the "loss of an opportunity." MCL 600.2912a(2). In the first sentence, the Legislature requires medical malpractice plaintiffs to prove that "he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." *Id.* In the second sentence, the Legislature limited the circumstances in which a medical malpractice plaintiff can recover "for loss of an opportunity," a distinct type of injury. *Id.* In any medical malpractice case, the plaintiff must prove that the defendant proximately caused the injury alleged, whether a direct injury or a lost opportunity.

The second sentence, by its terms, applies "in an action alleging medical malpractice," where the plaintiff seeks to recover "for loss of an opportunity to survive or an opportunity to achieve a better result." MCL 600.2912a(2). No one contests that this is a medical malpractice action. Nor does anyone truly contest that Mr. Stone is seeking to recover for the loss of the opportunity to have his aneurysm corrected without the amputation of his legs. (*See* Pls' Br at 4-5.) Accordingly, by its plain terms, MCL 600.2912a(2) applies.

B. Every court that has addressed delay-in-diagnosis and delay-in-treatment malpractice claims has applied the second sentence of MCL 600.2912a(2).

In the 14 years since the Legislature enacted MCL 600.2912a(2), there have been more than 20 Michigan appellate decisions involving medical malpractice arising from alleged

delays in diagnosis or treatment. In every single one of these decisions, the court analyzed the claim as a loss of opportunity, correctly recognizing that the delay in diagnosis did not directly cause the injury—the pre-existing illness, injury, or condition did.

For example, in *Klein v Kik*, 264 Mich App 682; 692 NW2d 854 (2005), the decedent died from a rare form of cancer. The decedent's personal representative sued the defendant doctor because a physician's assistant under the doctor's supervision initially misdiagnosed the decedent, delaying the treatment of the decedent's cancer by more than three months. *Klein*, 264 Mich App at 683-684. The trial court denied summary disposition because the case "does not appear to be an action for a lost opportunity." *Id.* at 684. On appeal, the plaintiff elaborated that "her claim is that defendant's negligence caused the decedent's death, with death being the injury." *Id.* at 686. The Court of Appeals rejected this argument, explaining that the "injury that defendant's malpractice allegedly caused was not the decedent's death *per se*, as plaintiff argues, but the increased chance of death between the decedent's two visits to the defendant's medical office." *Id.* at 686. The plaintiff was "not alleging that defendant somehow gave the decedent cancer or acted in some other negligent manner that caused the decedent to die; rather, plaintiff alleges that defendant hastened the decedent's death as a result of the latter being misdiagnosed." *Id.* at 686-687. There, as here, the plaintiff's "attempt to distinguish the decedent's injury from his loss of opportunity to survive is futile because they are one and the same." *Id.* at 687.

Here, as in *Klein*, the plaintiff had a pre-existing condition—an aortic aneurysm—that was not caused by the defendants but which did cause the patient's eventual injury—amputation. In both cases, the delay in diagnosis caused the patient to lose the opportunity for a better result—here, the opportunity for elective surgery with less risk of amputation.

Accordingly, the delay in diagnosis caused the loss of opportunity to avoid the physical injury and not the physical injury itself. This case is very different than one where a doctor commits malpractice and amputates the wrong leg, or amputates a leg on the wrong patient, the kind of malpractice where it can be said that the doctor's negligence itself caused the injury. In the situation here, it is the aortic aneurysm that directly causes an amputation.

Every other Michigan appellate case—more than 20 in all—that has addressed this issue has reached the exact same conclusion. *Wilson v Plyler*, 2007 WL 866233, at *1 (Mich Ct App, Mar 22, 2007) (analyzing the physician's failure to diagnose and treat a mass in the plaintiff's lungs as a loss of opportunity claim); *Baker v St John Health Sys*, 2007 WL 162718, at *1 (Mich Ct App, Jan 23, 2007) (holding that the hospital's delay in treatment, after the ambulance called ahead to alert the hospital of the patient's emergent status, was a loss of opportunity claim); *Hunter v Madison Cmty Hosp, Inc*, 2006 WL 3817152, at *1 (Mich Ct App, Dec 28, 2006) (reviewing the doctor's failure to adequately treat the decedent for his severe psychiatric illness, which subsequently led to his suicide as a loss of the opportunity to survive); *Williams v Chelsea Cmty Hosp*, 2006 WL 3826743, at *1-2 (Mich Ct App, Dec 28, 2006) (analyzing the doctor's failure to diagnose the plaintiff's calcaneal fracture, which led to severe arthritis, as a loss of opportunity claim); *Bailey v Khalid*, 2006 WL 2613736, at *1-2 (Mich Ct App, Sep 12, 2006) (stating that the plaintiff's claim was for a loss of opportunity where the doctor failed to timely diagnose the patient's metastic lung cancer); *Compton v Pass*, 2006 WL 2419187, at *1-2 (Mich Ct App, Aug 22, 2006) (analyzing the plaintiff's claim as a loss of opportunity where the doctor failed to adequately treat the patient's breast cancer); *Bevis v Bartholomew, DO*, 2006 WL 1688172, at *1 (Mich Ct App, June 20, 2006) (reviewing the case as a loss of opportunity where the doctor failed to timely diagnose and treat the plaintiff's bone

abscess and osteomyelitis); *Schultz v Ingham Reg'l Med Ctr*, 2006 WL 1451557, at *1, 8 (Mich Ct App, May 25, 2006) (analyzing the plaintiff's claim as a loss of opportunity, where there was a delay in the diagnosis of deep vein thrombosis and compartment syndrome, which led to permanent nerve damage in the plaintiff's knee); *Zemaitis v Spectrum Health*, 2006 WL 890064, at *1 (Mich Ct App, Apr 6, 2006) (stating the plaintiff's claim was a loss of opportunity to survive where the doctor failed to properly diagnose and treat the patient's metastasized sarcoma); *Cripps v Mecosta County Gen Hosp*, 2006 WL 448700, at *2 (Mich Ct App, Feb 23, 2006) (analyzing the plaintiff's claim as a loss of opportunity to achieve a better result); *Johnson v Henry Ford Hosp*, 2005 WL 655820, at *1 (Mich Ct App, Mar 22, 2005) (reviewing the plaintiff's claim as a loss of opportunity where the hospital failed to treat the patient with the proper blood transfusions); *Jarzombek v Clinton Women's Health Care, P.C.*, 2005 WL 320684, at *1 (Mich Ct App, Feb 10, 2005) (stating that the failure to timely diagnose and treat the patient's eptopoic pregnancy, leading to emergency surgery to remove her fallopian tube, was a claim for loss of opportunity to achieve a better result); *Kuper v Metro Hosp*, 2005 WL 179758, at *1 (Mich Ct App, Jan 27, 2005) (analyzing the plaintiff's claim for failure to diagnose and treat the plaintiff for bacterial growths on his heart, which led to bacterial endocarditis, as a loss of opportunity claim); *Klein v Kik*, 264 Mich App 682, 683-84 (2005) (holding that a delay in treatment and diagnosis of cancer is clearly a loss of opportunity case under MCL 600.2912(a)); *Ensink v Mecosta County Gen Hosp*, 262 Mich App 518, 520-21 (2004) (stating that the plaintiff's claim for failure to timely administer the t-PA drug to the stroke patient, was a loss of opportunity claim); *Renswick v Providence Hosp & Med Ctr, Inc.*, 2004 WL 1222924, at *1 (Mich Ct App June 3, 2004) (analyzing the plaintiffs claim as a loss of opportunity to survive, where the defendant left a surgical sponge in the patient, requiring a second surgery which left

the patient unable to undergo cancer treatment); *Aldridge v Family Health and Occupational Ctr*, 2003 WL 1440207, at *4 (Mich Ct App, Mar 20, 2003) (reviewing plaintiff's claim that removal of a spinal cord tumor led to partial paralysis as a loss of opportunity claim); *Potter v Ingham Reg'l Med Ctr*, 2003 WL 35630, at *1 (Mich Ct App, Feb 18, 2003) (regarding plaintiff's claim that delay in administration of the plasminogen activator increased his risk of stroke as a loss of opportunity claim rather than a claim that the delay in administration proximately caused plaintiff's stroke); *Magnotta v Bons Secours Hosp*, 2002 WL 31955224, at *1 (Mich Ct App, Dec 17, 2002) (considering plaintiff's claim that the delay in administration of antibiotics contributed to the loss of her prosthetic knee a claim of loss of opportunity to achieve a better result); *Fulton v William Beaumont Hosp*, 253 Mich App 70, 78-81; 655 NW2d 569 (2002) (analyzing plaintiff's claim that delay in diagnosis contributed to her death from cervical cancer as a loss of opportunity to survive claim); *Baretta v Dimitrijevic*, 2002 WL 1804052, at *1 (Mich Ct App, Aug 6, 2002) (reviewing plaintiff's claim that defendant's failure to maintain plaintiff at a therapeutic dose of the anticoagulant Coumadin contributed to his suffering of a stroke as a claim of loss of opportunity to achieve a better result); *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59-62; 631 NW2d 686 (2001) (opining that plaintiff's claim that a delay in diagnosing her breast cancer led to a decrease in her life expectancy and constituted a claim of loss of opportunity to survive could not be asserted by plaintiff because she was still alive); *Dykes v William Beaumont Hosp*, 246 Mich App 471, 476-78; 633 NW2d 440 (2001) (analyzing plaintiff's claim, that misdiagnosis of her son's condition as recurrent leukemia rather than a respiratory infection caused the death of her son, as a loss of opportunity to survive claim); *Theisen v Knake*, 236 Mich App 249, 259-260; 599 NW2d 777 (1999) (finding that plaintiff failed to properly plead a loss of opportunity to survive where she alleged a delay in diagnosis of

her husband's condition lead to his death, making such a claim appropriate); *see also Blair v Hutzel Hosp*, 217 Mich App 502, 512; 552 NW2d 507 (1996) (applying the lost opportunity doctrine, before the enactment of MCL 600.2912a, to a wrongful birth claim arising from defendant's alleged negligent failure to offer plaintiff a material serum alpha fetoprotein screening during the second trimester of her pregnancy to detect downs syndrome). This Court should not upset the well-settled state of Michigan law or the Court of Appeals opinion below by holding that Mr. Stone's delay-in-diagnosis claims are somehow not subject to the second sentence of MCL 600.2912a(2).

II. MCL 600.2912a(2) Should Be Interpreted To Require Plaintiffs To Demonstrate That Any Opportunity Lost Was Greater Than 50%.

Consistent with the Legislature's purpose of responding to the soaring cost of medical malpractice that was driving qualified physicians to retire or leave the State, MCL 600.2912a(2) includes a requirement that a medical malpractice patient prove that his or her lost opportunity for a better result or opportunity to survive exceeded 50%. The Court of Appeals correctly concluded that the Legislature intended that opportunity lost must be greater than 50%. *Fulton v William Beaumont Hosp*, 253 Mich App 70, 79-80; 655 NW2d 569 (2002). This is the only interpretation of MCL 600.2912a(2) that is grammatically correct and consistent with the legislative purpose.

A. The interpretation of the final clause of MCL 600.2912a(2) adopted by the Court of Appeals in *Fulton* is correct.

The second sentence of MCL 600.2912a(2) states: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of [1] an opportunity to survive or [2] an opportunity to achieve a better result, unless the opportunity was greater than 50%." In *Fulton*, the Court of Appeals acknowledged that the final clause could be interpreted to refer to the initial

opportunity to survive or achieve a better result or it could be interpreted to refer to the opportunity to survive or achieve a better result that was lost as a result of the malpractice. *Fulton*, 253 Mich App at 79-80. The Court explained that either reading required the help of a judicial inference:

> [F]or the language of MCL 600.2912a(2) to plainly indicate that the former interpretation of the state was intended, the word "initial" must be inferred to modify "opportunity" where the statute refers to the plaintiff's burden of showing that "the opportunity was greater than 50%." However, for the language of the statute to plainly indicate that the latter interpretation was intended, the words "loss of" must be inferred to modify "opportunity."

Id. at 80. The *Fulton* court ultimately adopted the latter interpretation after considering the context in which the Legislature enacted MCL 600.2912a(2).

Although MDTC agrees with the result the *Fulton* court reached, MDTC respectfully disagrees that it is necessary to look outside the text of the statute to resolve any ambiguity regarding the meaning of "the opportunity." Applying normal rules of grammar, the words "the opportunity" in the final clause of MCL 600.2912a(2) refer back to the previous uses of the word "opportunity" in the sentence. The phrases "[1] an opportunity to survive" and "[2] an opportunity to achieve a better result" are the antecedents to which the Legislature was referring when it used the words "the opportunity" in the final clause of MCL 600.2912a(2). The Legislature modified both of the antecedents with the words "loss of." Thus it is logical to conclude that the phrase "the opportunity" is also modified by the earlier words in the same sentence. When this straightforward reading of the language of MCL 600.2912a(2) is applied, it is clear that the Legislature intended to limit recovery in medical malpractice actions for the loss of opportunity to those cases where the opportunity lost is greater than 50%.

The *Fulton* court was also correct in concluding that this interpretation of MCL 600.2912a(2) is consistent with the history of the statute. As noted above, MCL 600.2912a(2) was enacted as part of a bill to limit the rising costs of medical malpractice insurance to ensure the availability and affordability of healthcare services in the State of Michigan. The statute furthers the Legislature's intent by limiting recovery in medical malpractice cases.

Moreover, the statute was enacted to define what "loss of opportunity" was "substantial" after this Court's decision in *Falcon v Memorial Hospital*, 436 Mich 443, 470; 462 NW2d 44 (1990). *Fulton*, 253 Mich App at 81; *Weymers v Khera*, 454 Mich 639, 649; 563 NW2d 647 (1997). As Judge Talbot ably explained in *Fulton*, "it is reasonable to conclude that MCL 600.2912a(2) was enacted to codify and increase the requirements for what constitutes a 'substantial loss of opportunity.'" *Fulton*, 253 Mich App at 82. "The rational interpretation is that the Legislature amended the statute as a rejection of the *Falcon* Court's holding that a 37.5 percent loss of an opportunity was substantial, and therefore actionable." *Id.* Likewise, the *Fulton* court perceptively analyzed *Falcon* to conclude that the focus of the *Falcon* court was the substantiality of a loss of a 37.5% opportunity and not the fact that the initial opportunity was 37.5%:

> [T]he *Falcon* Court stated its holding in terms of what was lost: "We are persuaded that loss of a 37.5 percent opportunity of living constitutes a loss of a substantial opportunity of avoiding physical harm. We need not now decide what lesser percentage would constitute a substantial loss of opportunity." We interpret the Legislature's response as addressing that question.

Id. at 83 n 5 (internal citation omitted).

Finally, application of the analysis adopted in *Fulton* demonstrates its efficacy. By requiring a plaintiff to demonstrate that the opportunity that the plaintiff actually lost exceeds 50%, plaintiffs whose initial opportunity for a better result or to survive was less than 50% are

barred from recovering for their loss of opportunity. *See Fulton*, 253 Mich App at 83 n 6. But the statute is also interpreted to bar claims brought by plaintiffs with insubstantial losses of opportunity, such as where the alleged malpractice causes a reduction in the decedent's chances of survival from 99% to 98%. The possibility of a plaintiff recovering for a slight loss of opportunity to survive is particularly troublesome because, as the Court explained in *Falcon*, the plaintiff is permitted to recover 100% of the damages. *Falcon*, 436 Mich at 450. Even though the plaintiff's risk of a bad result increased only slightly, and even though the plaintiff was subject to the risk of the same result in the absence of negligence, the connection between the plaintiff's damages and the negligence is "compensated as if it were a certainty." *Id.* Only the approach adopted by the Court of Appeals in *Fulton* meaningfully addresses the need for plaintiffs to prove a substantial loss of opportunity while remaining true to the text. Consequently, only the approach in *Fulton* is consistent with the text and history of MCL 600.2912a(2).

B. The approach to calculating loss of opportunity advocated by Dr. Waddell is not supported by the text of MCL 600.2912a(2).

The finer points of the statistical analysis of Dr. Waddell's theory (and *amici*'s derivative theories) have been well-hashed. MDTC will limit its discussion of Dr. Waddell's theory to its two most fundamental flaws—it has no basis in the text of MCL 600.2912a(2), and it permits plaintiffs to recover in the absence of a substantial loss of opportunity.[1]

[1] Ironically, the parties and *amici* apparently all agree that the Legislature has prohibited any recovery where the initial opportunity to survive or obtain a better result was 50% or less and that the Legislature intended to further limit recovery for lost opportunity where the initial opportunity was greater than 50%. The parties merely disagree regarding what approach to apply to determine whether the plaintiff exceeded the 50% threshold.

1. *Dr. Waddell's theory has no basis in the text of the statute.*

There is no connection between Dr. Waddell's theory for calculating whether a lost opportunity exceeded 50% and the text of MCL 600.2912a(2). Instead, what Plaintiffs and their supporting *amici* seek, is for this Court to judicially impose a new approach to the calculation that they believe is the best public policy. But as this Court has oft-repeated, the "Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature." *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004); *Murphy v Mich Bell Tel Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). Moreover, it is not the responsibility of courts to interpret statutes to adopt what the courts believe is the wisest or best public policy. *Melia v Appeal Bd of Mich Employment Sec Comm'n*, 346 Mich 544, 561; 78 NW2d 273 (1956) ("The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere."); *Mich & Vicinity Conference Bd, Int'l Molders & Foundry Workers Union of NA, AFL v Enterprise Foundry Co*, 321 Mich 265, 270; 32 NW2d 515 (1948).

Here, the plain language of the statute and the history of its enactment demonstrate that the Legislature did not intend to adopt the complicated approach recommended by Plaintiffs and their *amici*. There is no evidence that by using the words "unless the opportunity was greater than 50%" the Legislature meant "unless the plaintiff's treated survival rate less the plaintiff's untreated survival rate divided by 100 less the untreated survival rate multiplied by 100 was greater than 50."

Moreover, such an interpretation requires the conclusion that the Legislature rejected the approach that courts had long used to determine whether a loss of opportunity to survive was more likely than not. In *Falcon*, the Court adopted the same approach to measure

the loss of opportunity to survive as the Court of Appeals adopted in *Fulton*. It simply subtracted the likelihood of survival after the alleged negligence (0%) from the likelihood of survival had proper treatment been administered (37.5%) to conclude that the opportunity to survive that had been lost was 37.5%. *Falcon*, 436 Mich at 454-455. Although the Michigan Legislature promptly rejected the substantial possibility approach to loss of opportunity adopted in *Falcon*, there is no evidence in the statute that the Legislature also intended to reject the straightforward mathematical approach to determining the loss of opportunity that the Court had adopted in *Falcon*. Nor do Plaintiffs or any of the *amici* cite to any other jurisdiction that had adopted Dr. Waddell's approach before (or even after) the enactment of MCL 600.2912a(2).

Even if the Court were to determine that Dr. Waddell's approach was good public policy, as the Plaintiffs and their *amici* have apparently concluded, it is not possible to interpret the plain language of MCL 600.2912a(2) to incorporate that approach. Such a change is a legislative responsibility. *Melia*, 346 Mich at 561.

2. *Dr. Waddell's approach allows for recovery for insubstantial losses of opportunity.*

In addition, Dr. Waddell's approach allows recovery in cases involving only the slightest losses of opportunity. Under Dr. Waddell's approach, the greater the initial opportunity of survival or a good result (the "treated survival rate"), the smaller the loss of opportunity that is necessary for a plaintiff to recover. As the chart below illustrates, relatively small changes—from 99% to 97.99% or even 80% to 59.99%—would lead to a recovery under MCL 600.2912a(2).

Treated Survival Rate	**Untreated Survival Rate**	**Minimum Loss of Opportunity to Exceed 50%**
99%	97.99%	1.01%

95%	89.99%	5.01%
90%	79.99%	10.01%
80%	59.99%	20.01%
70%	39.99%	30.01%
60%	19.99%	40.01%
50%	0%	Never exceeds 50%

Thus, unlike the approach adopted by the Court of Appeals in *Fulton*, under Dr. Waddell's approach, a plaintiff can recover for even insubstantial losses of opportunity, losses so small that they often fall well within the statistical margin of error when evaluating medical outcomes. And again, even though the loss of opportunity to the Plaintiff is slight in such cases, the Plaintiff recovers 100% of his or her damages. Such anomalous results further demonstrate why this Court should not overturn *Fulton*.

III. The Loss Of An Opportunity To Survive Or Obtain A Better Result Must Be Determined Only With Regard To The Increased Risk Of The Specific Injuries Suffered By Plaintiffs.

Under MCL 600.2912a(2), a calculation of the "loss of an opportunity to survive or an opportunity to achieve a better result" must be determined only by consideration of the increased risk of the specific injury or injuries *actually* suffered by the patient. The lower courts erred in considering the aggregate increased risk posed by the alleged malpractice, which impermissibly included risks associated with injuries that the patient did not suffer and the increased risk of death, which did not occur. The lower courts' interpretation is in direct contravention of fundamental principles of tort law, the Legislature's intent as evidenced by the plain language of the statute, and this Court's decisions precluding recovery for speculative injuries that have not been suffered.

A fundamental tenet of tort law is to compensate victims for actual injury. "Recovery is not permitted in a tort action for remote, contingent, or speculative damages." *Theisen v Knake*, 236 Mich App 249, 258; 599 NW2d 777 (1999). In Michigan, a plaintiff must demonstrate an actual injury to person or property in order to recover under a negligence theory. *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005) (holding tort claim for injuries that have not been actually suffered is precluded as a matter of law). The logic supporting the injury requirement is to allow victims "suitable redress" only when "their rights have actually been violated." *Id.* at 74, *citing* COOLEY ON TORTS § 32 (4th ed).

Specifically, in Michigan, under medical malpractice law, a "plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants" as part of the prima facie case. MCL 600.2912a(2); *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). The plaintiff must prove the existence of both cause in fact and legal cause in order to establish proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2 475 (1994). This Court in *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997), refused to recognize a cause of action for the loss of an opportunity to avoid physical harm less than death because this Court noted that it would be a flagrant disregard of traditional tort law concepts of causation. Similarly, to hold that a plaintiff's recovery may be determined with reference to an injury that has not occurred, and which never will occur, as a result of the defendant's alleged negligence is inconsistent with the fundamental requirements of causation and injury well-settled in Anglo-American jurisprudence.

Furthermore, by including in the determination of whether the plaintiff has established a prima facie case, the consideration of injuries not suffered by and opportunities not lost to the plaintiff, the lower courts have imposed a lighter burden on plaintiffs than is required

by the plain language of the statute. Mr. Stone could not recover for the abstract increased risk of having to undergo a bilateral amputation if he had not actually suffered a bilateral amputation. Likewise, Mr. Stone should not be allowed to recover for the inchoate injury of an increased risk of death where death did not occur.

The plain language of MCL 600.2912a(2) explicitly distinguishes between the "loss of an opportunity to survive" and the loss of an "opportunity to achieve a better result." For example, had Mr. Stone failed to survive the surgery, but underwent the surgery without having a bilateral amputation, his increased risk of requiring amputation would not be an appropriate factor in determining his loss of opportunity to survive. The aggregate increased risk of other potential injuries that did not occur is not an appropriate factor for measuring the loss of opportunity to survive. In the same vein, the potential for death does not determine a patient's opportunity to achieve a better result. The factoring in of all potential abstract risks could have limitless boundaries, and in effect render the statute's greater than 50% percent requirement meaningless.

Mr. Stone is attempting to fit his claim within the framework of MCL 600.2912a(2) after this Court has rejected a similar attempt to recover for an unrealized injury in *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 61; 631 NW2d 686 (2001) (holding a loss of opportunity to survive claim actionable only "where death has occurred"). In *Wickens*, this Court concluded that the plain language of MCL 600.2912a(2) "expressly limits recovery to injuries that have already been suffered and more probably than not were caused by the defendant's malpractice." *Id.* at 60. In particular, this Court held that "a living plaintiff may not recover for loss of an opportunity to survive on the basis of a decrease in her chances of long-term survival." *Id.* at 62.

The Court of Appeals attempts to reconcile its decision in this case with *Wickens* by trying to distinguish between reduced life expectancy as being too speculative and the risk of potential for death. However, while the purported injury in *Wickens* was prospective and could potentially occur in the future, the risk of death alleged by Mr. Stone will never materialize as a result of the Defendants' alleged negligence. The only notable distinction is that a potential past injury that has not been suffered is weaker than a potential future injury, and as such should similarly be precluded.

The Court of Appeals erroneously states that "the 'loss of an opportunity to survive' has been specifically interpreted to mean a reduction in life expectancy and not to exclusively encompass the risk of death." However, the Court of Appeals cites to no authority to support this proposition. Quite the contrary, this Court in *Wickens* expressly held that "a loss of an opportunity to survive claim only encompasses injuries already suffered, which clearly limits recovery to situations where death has already occurred." *Wickens*, supra at 60-61. This Court in *Wickens* interpreted that a reduction in life expectancy was not a compensable injury, and did not constitute the "loss of an opportunity to survive." The lower courts' determination that a living person can recover for the increased risk of death under a claimed "loss of an opportunity for a better result" is an unreasoned attempt to circumvent this Court's holding in *Wickens*.

This is not to say, however, that the appropriate comparison must be between the risk of amputation of all individuals with aortic aneurysms who have elective surgery and <u>all</u> individuals with aortic aneurysms that rupture and are forced to undergo emergency surgery. Such an approach would bar any malpractice claim involving an injury other than death because of the approximately 90% fatality rate for the latter group. Rather, the comparison must be made between the risk of an amputation among those who survive a rupture of an aortic aneurysm and

the risk of an amputation for those who have elective surgery. Here, the loss of opportunity to achieve a better result is an increase in risk from approximately 1% to between 40% and 50%—less than 50%. (Ct of Appeals Op at 5.) Mr. Stone's loss of an opportunity to achieve a better result does not satisfy the public policy threshold adopted by the Legislature. Accordingly, the lower courts' decisions should be reversed.

CONCLUSION

Amicus Curiae MDTC respectfully requests that this Court reject the Plaintiffs' invitation to re-characterize this as a direct injury case and affirm that the lower courts correctly concluded that the final sentence of MCL 600.2912a(2) applies to Plaintiffs' malpractice claims. MDTC further requests that the Court ratify the approach for calculating the loss of opportunity adopted in *Fulton*. Finally, MDTC requests that the Court reverse the lower courts' conclusion that the risk of suffering an injury other than the injury actually suffered should be included in the calculation of a loss of opportunity to achieve a better result.

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